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NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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| CARPET AMERICA RECOVERY EFFORT,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY et al.,<br><br>Defendants and Respondents. | C089577<br><br>(Super. Ct. No. 34201880002973CUWMGDS) |

The Legislature enacted Assembly Bill No. 2398 in 2010, establishing a mandatory carpet stewardship program effective January 1, 2011. (Stats. 2010, ch. 681, § 1.) Assembly Bill No. 2398 added chapter 20, titled "Product Stewardship for Carpets," to part 3 of division 30 of the Public Resources Code (the carpet law).[1] (Stats.

[1] All further statutory references are to the Public Resources Code as enacted in 2010 pursuant to Assembly Bill No. 2398 unless otherwise specified. The Legislature

2010, ch. 681, § 2.) The Legislature declared, "[i]t is in the interest of the state to establish a program, working to the extent feasible with the carpet industry and related reclamation entities, to increase the landfill diversion and recycling of postconsumer carpet generated in California." (Stats. 2010, ch. 681, § 1, subd. (f).) In 2010, discarded carpet was one of the 10 most prevalent waste materials in California landfills. (Stats. 2010, ch. 681, § 1, subd. (a).)

Respondent the California Department of Resources Recycling and Recovery (department) oversees the carpet stewardship program and enforces the carpet law and its implementing regulations. (§§ 42971, subd. (h), 42974, subd. (a); Cal. Code Regs., tit. 14, § 18940 et seq.) The carpet law requires the regulated industry to, among other things, develop a carpet stewardship plan to meet the broad goals of the carpet stewardship program. (§ 42972.) The stewardship plan must "[i]nclude goals that, to the extent feasible based on available technology and information, increase the recycling of postconsumer carpet, increase the diversion of postconsumer carpets from landfills, increase the recyclability of carpets, and incentivize the market growth of secondary products made from postconsumer carpet." (§ 42972, subd. (a)(2).)

Once the department approves a carpet stewardship plan, manufacturers or their designated stewardship organization(s) must implement the carpet stewardship plan and submit annual reports to the department detailing their performance. (§§ 42973, 42976.) A carpet stewardship organization is "[a]n organization appointed by one or more manufacturers to act as an agent on behalf of the manufacturers to design, submit, and administer a carpet stewardship plan . . . ." (§ 42971, subd. (e)(1)(A).) To achieve compliance with the carpet law, "a carpet stewardship organization shall, on or before July 1, 2013, and annually thereafter, demonstrate to the department that it has achieved

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amended portions of the pertinent statutory sections in 2017 (Stats. 2017, ch. 794, §§ 1-9); the challenged findings at issue in this appeal concern actions predating the 2017 amendments.

continuous meaningful improvement in the rates of recycling and diversion of postconsumer carpet subject to its stewardship plan and in meeting the other goals included in the organization's plan pursuant to paragraph (2) of subdivision (a) of Section 42972." (§ 42975, subd. (a).) The department may impose administrative civil penalties on any person in violation of the carpet law. (§ 42978.)

Petitioner Carpet America Recovery Effort, a nonprofit public benefit corporation, is a carpet stewardship organization. (§ 42971, subd. (c).) This appeal flows from an administrative enforcement proceeding in which the department issued a decision to impose penalties on petitioner for failing to make continuous meaningful improvement in its carpet stewardship plan goals over several years. The trial court denied petitioner's petition for administrative writ of mandate, upholding the department's decision.

On appeal, petitioner asserts: (1) the department failed to apply the phrase continuous meaningful improvement in accordance with section 42975; (2) the department abused its discretion by ignoring factors other than the actual rate of recycling in determining petitioner's compliance with the carpet law; and (3) the department abused its discretion by finding petitioner failed to achieve continuous meaningful improvement in 2013 because the finding is not supported by the evidence. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

We borrow some of the undisputed pertinent facts from the department's administrative enforcement decision and the trial court's ruling to provide a brief background.

Petitioner submitted its carpet stewardship plan to the department in or about December 2011 (plan version 1.4). The department conditionally approved plan version 1.4 on January 17, 2012, and required petitioner to submit a new plan after one year to "refine [its] specific goals and establish a baseline from which progress in recycling output could be measured." Petitioner submitted a revised plan (plan version 3.0) to the department on December 23, 2013. The department approved plan version 3.0 in January

2014. On March 10, 2014, petitioner submitted minor corrections to plan version 3.0, as plan versions 3.2 and 3.2.2. The department accepted the revised versions.

Petitioner submitted its 2013 annual report on July 1, 2014. "The report listed a 12.2 percent recycling output rate for 2013." The department found the 2013 annual report to be noncompliant because it did not meet the statutory requirements and petitioner failed to make " 'sufficient continuous and meaningful improvement toward the goals approved in the Plan, particularly with respect to the last seven quarters that show no gain in the recycling rate.' " In that regard, the department explained: "While the *2013 Annual Report* showed an annual 2% gain from 10% recycling of post-consumer carpet discards in 2012 to 12% in 2013, it is not on course to achieve the 2016 goal of 16% by 2016. The increase in the recycling rate from 2012 to 2013 is due to an increase in the recycling rate that occurred in the second quarter of 2012 and the rate has not increased further. In the past seven quarters . . . there has been a flat recycling rate of 12% . . . ." The department also "identified a lack of 'meaningful and continuous improvement' in the Plan's goals to increase the recycling and reuse of postconsumer carpet," among other things. The department deferred any enforcement action "on the condition that the Program and the 2014 Annual Report addresses the key issues . . . and the deficiencies" outlined by the department.

Petitioner submitted its 2014 annual report on July 1, 2015. "The report listed an overall recycling output rate of 12.1 percent, with a downward trend to 11 percent reported in the fourth quarter." Petitioner "attributed the decline in recycling rate, in part, to the fall in crude oil prices from 2012 to 2014, a port labor dispute, an unexpected drop in demand from Asia, and increased volume of non-nylon carpet discards." The department found the 2014 annual report to be noncompliant, in part because petitioner "again failed to demonstrate continuous meaningful improvement in the recycle output rate." The department again deferred any enforcement action and asked petitioner to submit a plan amendment.

Petitioner submitted its 2015 annual report on July 1, 2016. "The report listed an overall recycle output rate of 10 percent and no improvement in the diversion rate." Petitioner "blamed the lack of improvement on a 'perfect storm of global macroeconomic and industry conditions,' including the falling price of oil and other commodities, the West Coast port shutdown, the market shift from nylon to less expensive carpet, softening demand from Asia, the shutdown of a large non-California nylon processor, and downsizing in the recycling industry." The department found the 2015 annual report to be noncompliant because petitioner "failed to demonstrate continuous meaningful improvement in its recycling and diversion rates and other performance goals." The department elected to refer the matter for an enforcement action.

On March 10, 2017, the department brought an accusation against petitioner alleging it failed to demonstrate continuous meaningful improvement in the rates of recycling and diversion and in achieving other goals for 2013, 2014, and 2015. The accusation states "[t]he recycling rate listed in the 2013 Annual Report was 12.2%, which did not demonstrate meaningful improvement over the 12% recycling rate reached mid-way through the prior reporting period." "The recycled output rate decreased from 12.2% to 12.1% in 2014 (and the last quarter of 2014 indicating a downward trend in the rate to 11%)." "The recycled output rate decreased from 12.1% to 10% for 2015."

An administrative law judge presided over the enforcement proceeding and submitted a proposed decision to the department for consideration. The department adopted the administrative law judge's proposed decision with some modifications. The department imposed a $821,250 penalty on petitioner for its noncompliance in 2013, 2014, and 2015.

Petitioner filed a verified petition for writ of administrative mandate challenging the penalties imposed on it by the department. The trial court held a hearing on the merits and denied the petition. Petitioner appeals.

## DISCUSSION

### I

### *Petitioner Fails To Show The Department Did Not Apply The Continuous Meaningful Improvement Requirement*

Under the heading, "the decision failed to apply the statutory phrase 'continuous meaningful improvement' as required by the statute," (bolding and capitalization omitted) petitioner asserts the department repeatedly applied a nonstatutory standard, continuous and meaningful improvement, in evaluating petitioner's compliance. Petitioner further sets forth portions of the testimony given by deputy director Howard Levenson and environmental program manager Clark Williams during the enforcement proceeding.

For the proposition that the department repeatedly applied a continuous and meaningful improvement standard instead of the statutory continuous meaningful improvement standard, petitioner refers us to a single page in the administrative record. The page forms part of a request for approval from Levenson to director Caroll Mortensen requesting approval of the recommendation to find petitioner's 2013 annual report noncompliant because, among other things, "it is not clear that the Program is making continuous and meaningful improvement." The request for approval is not, however, pertinent to whether the department applied the correct statutory requirement *in the administrative enforcement decision,* which forms the subject of our review on appeal.

The enforcement proceeding was heard by an administrative law judge. The administrative law judge interpreted and applied the continuous meaningful improvement standard in section 42975, and the department adopted the administrative law judge's decision with some modifications. That the department used language of continuous and meaningful improvement instead of continuous meaningful improvement in a single

request for approval has no bearing on whether the administrative enforcement decision should be upheld.

As to petitioner's reliance on portions of the testimony given by Levenson and Williams during the enforcement proceeding, we note petitioner provides no argument in its opening brief as to how or why the testimony supports its position that the department failed to apply the continuous meaningful improvement requirement under section 42975, as stated in the heading of its argument. We thus do not consider the testimony. " 'In order to demonstrate error, an appellant must supply the reviewing court with some cogent argument supported by legal analysis and citation to the record.' " (*United Grand Corp. v. Malibu Hillbillies, LLC* (2019) 36 Cal.App.5th 142, 153.) " 'We may and do 'disregard conclusory arguments that are not supported by pertinent legal authority or fail to disclose the reasoning by which the appellant reached the conclusions [it] wants us to adopt.' " (*Ibid*.)

Petitioner presents no argument in its opening brief showing the department failed to apply the continuous meaningful improvement requirement under section 42975 in reaching its decision in the administrative enforcement proceeding. As such, we need not and do not address the department's arguments in response and petitioner's rebuttal arguments in its reply brief. (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 836 [our review "is limited to issues which have been adequately raised and supported in [the appellant's opening] brief" and any issues not raised therein are deemed forfeited or abandoned].) Because no coherent argument is presented for our review, we do not address the parties' dispute regarding the appropriate level of deference to be given to the department's statutory interpretations.

II

*Petitioner Fails To Show The Department Ignored Factors Pertinent To Petitioner's Compliance*

Under the heading, "[i]gnoring factors other than the actual rate of recycling constituted a prejudicial abuse of discretion," (bolding and capitalization omitted) petitioner's argument consists of slightly more than one page, approximately half of which merely quotes section 42975. Petitioner states section 42975, subdivision (a)(3), "makes it clear that the annual review of [petitioner's] performance may not consider solely the Plan's rate of recycling goal versus the actual rate achieved as suggested by the Director's decision." It believes "in the context of the statute as a whole, [the phrase] requires [the department] to consider the factors set forth within the Annual Report, such as a dramatic fall in the price of oil (which is tied to prices paid for raw materials), and China closing off its recycling market to imports." Petitioner does not, however, explain how or why the department's administrative enforcement decision failed to meet the requirements under section 42975. More specifically, although petitioner discusses factors that "could have impacted [petitioner's] ability to hit the recycling rate goal," it does not assert that there *were* factors that should have been considered pursuant to statute and that the department failed to consider them. We do not consider assertions made without argument and " 'fail[ing] to disclose the reasoning by which the appellant reache[s] the conclusions [it] wants us to adopt.' " (*United Grand Corp. v. Malibu Hillbillies, LLC, supra,* 36 Cal.App.5th at p. 153.)

Petitioner also asserts Williams's "overly narrow view of the statutory scheme was adopted by Respondent Director Smithline in his final decision," referring us to paragraph 19 on page 7 within a bates range (not referring us to a specific page). The only paragraph 19 on a page 7 within the cited bates range is part of the administrative law judge's proposed decision, which was adopted by the department with modifications. In that paragraph, the administrative law judge wrote that petitioner argued "the phrase

'continuous meaningful improvement' is not defined by statute or regulation, and therefore cannot support a finding that [it] violated the Carpet Law." The administrative law judge looked to the plain meaning rule to ascertain the Legislature's intended meaning of the phrase. In that regard, the administrative law judge set forth the dictionary definitions for continuous, meaningful, and improvement. Nothing in paragraph 19 refers us to Williams's testimony or adopts her testimony as a final decision. We thus do not find any merit in petitioner's contention.

III

*Petitioner Fails To Show The Department Abused Its Discretion In Finding Petitioner Noncompliant For 2013*

Petitioner argues the department prejudicially abused its discretion as provided in Code of Civil Procedure section 1094.5 because the department's findings of fact regarding petitioner's "performance contained within the 2013 Annual Report" are not supported by the evidence. Specifically, petitioner asserts the carpet stewardship plan in effect for 2013 was plan version 1.4, which set forth a total recycling output performance goal of 12 percent for 2013, as shown in table 1. Petitioner contends the department erred in considering its performance for 2013 under plan version 3.2.2., which set forth a total recycling output performance goal of 13 percent for 2013, because that plan was "*not even in effect* at the time of performance." Petitioner believes that, under plan version 1.4, "given the finding that 'continuous meaningful improvement' means achieving the goals in the Plan, then achieving 12.2% recycling output in 2013 exceeded the 2013 goal of 12% by 0.2%, rendering a finding of failure unsupported by the facts." Petitioner further argues the department's "decision improperly ignored the statutory mandate to consider the information in [petitioner's] Annual Reports before making a determination whether [petitioner] exhibited 'continuous meaningful improvement' in 2013, 2014, and 2015," such as "an unprecedented fall in oil prices that severely and negatively impacted the price for recycled materials."

" 'Section 1094.5 of the Code of Civil Procedure provides the basic framework by which an aggrieved party to an administrative proceeding may seek judicial review of any final order or decision rendered by a state or local agency.' [Citation.] 'In reviewing administrative proceedings under [Code of Civil Procedure] section 1094.5 that do not affect a fundamental right, such as [the enforcement proceeding here], the trial court reviews the whole administrative record to determine whether the findings are supported by substantial evidence and whether the agency committed any errors of law. [Citations.]' [Citation.] 'Our scope of review on appeal from such a judgment is identical to that of the trial court.'

" 'Under the substantial evidence test, the agency's findings are presumed to be supported by the administrative record and, in both the trial court and here on appeal, it is the petitioner/appellant's burden to show they are not. [Citations.] We " 'do not reweigh the evidence; we indulge all presumptions and resolve all conflicts in favor of the [agency's] decision. Its findings come before us "with a strong presumption as to their correctness and regularity." [Citation.]' " [Citation.] When more than one inference can be reasonably deduced from the facts, we cannot substitute our own deductions for that of the agency. [Citation.] We may reverse an agency's decision only if, based on the evidence before it, a reasonable person could not have reached such decision.' " (*Poncio v. Department of Resources Recycling & Recovery* (2019) 34 Cal.App.5th 663, 668-669.)

Considering petitioner's last argument first (i.e., that the department failed to consider additional information provided in petitioner's annual reports in determining petitioner's compliance), we note petitioner's sole citation to the record is to the executive summary contained in its 2015 annual report. Petitioner's claim of error, however, challenges the department's finding of petitioner's noncompliance *for 2013*. Petitioner does not explain, and we fail to see, how or why anything contained in petitioner's 2015 annual report informs the issue before us, that is, whether the

department's noncompliance finding for 2013 is supported by substantial evidence. We thus do not address the argument.

We also find no merit in petitioner's assertion that the department erred in using the total recycling output performance goal contained in plan version 3.2.2 instead of plan version 1.4 to evaluate petitioner's 2013 compliance. The fundamental flaw in petitioner's argument is that, even if we were to agree with petitioner, petitioner fails to establish the department's finding of noncompliance is not supported by substantial evidence. As the trial court explained, the department's finding that petitioner had not made sufficient continuous meaningful improvement in the recycling rate in 2013 was *not* based on petitioner's failure to attain the recycling output goal for 2013 but was instead based on the fact the recycling output rate "stalled at 12 percent early in 2012 and remained flat throughout 2013." "As a result, [the department] concluded [petitioner] did not show 'continuous' meaningful improvement and was not 'on course' to achieve its 2016 goal of 16 percent."

Moreover, the department's noncompliance finding for 2013 extended beyond the recycling output rate. The department also found petitioner had not made continuous meaningful improvement toward its other goals of increasing the recyclability of carpet, the reuse of postconsumer carpet, and the market growth of secondary products made with postconsumer recycled carpet content. Petitioner's compliance with such other goals were properly considered noncompliant under section 42975. (§ 42975 [petitioner had to "demonstrate to the department that it has achieved continuous meaningful improvement in the rates of recycling and diversion of postconsumer carpet subject to its stewardship plan *and in meeting the other goals*"] italics added.)

Petitioner does not acknowledge or address the foregoing evidence supporting the department's noncompliance finding for 2013. Petitioner thus cannot establish there was no substantial evidence in the record to support the decision. (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1408 ["[a]n appellant who fails to cite and discuss the evidence

supporting the judgment cannot demonstrate that such evidence is insufficient"; an appellant "who cites and discusses only evidence in [its] favor fails to demonstrate any error and waives the contention that the evidence is insufficient to support the judgment"].) We conclude petitioner failed to show the department prejudicially abused its discretion as provided in Code of Civil Procedure section 1094.5.

DISPOSITION

The judgment is affirmed. The department shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1)-(2).)

/s/
Robie, J.

We concur:

/s/
Blease, Acting P. J.

/s/
Murray, J.